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No.____

IN THE
**SUPREME COURT OF THE UNITED STATES**

**October Term, 1982**

CLARENCE W. ARRINGTON,
*Petitioner,*

vs.

THE NEW YORK TIMES COMPANY, et al.,
*Respondents.*

# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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Dated: November 15, 1982

## QUESTIONS PRESENTED

1. Whether the New York Court of Appeals erred in holding that the first amendment to the United States Constitution prohibits recognition of a privacy cause of action against a newspaper that publishes a full-page photograph of a nonpublic person, without his consent, to illustrate an article in its Sunday magazine section with which the person has no connection.

2. Whether the right to privacy under the United States Constitution requires a state to protect a nonpublic person against appropriation of his photograph to illustrate an article with which he has no connection.

## PARTIES TO THE PROCEEDINGS

Petitioner was the plaintiff-appellant below.

Respondent The New York Times Company, a corporation and publisher of the photograph, was one of four defendants-respondents below. The others were Gianfranco Gorgoni, an individual and the photographer, Robert Pledge, an individual and Gorgoni's agent, and Contact Press Images, Inc., a corporation of which Pledge is president.

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CLARENCE W. ARRINGTON,
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THE NEW YORK TIMES COMPANY, *et al.*,
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# PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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Petitioner, Clarence W. Arrington ("Arrington"), respectfully prays that a writ of certiorari issue to review the opinion and order of the Court of Appeals of New York entered on April 7, 1982. The Court of Appeals of New York upheld dismissal of the complaint against The Times, which commissioned and published Arrington's photograph. The court below, however, held that Arrington had a cause of action against the other respondents, who took the photograph at the request of The Times.

## OPINIONS BELOW

The opinion and order of the Court of Appeals of New York, reported at 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982), are reproduced in Appendix A. The opinion and order of the New York State Supreme Court, Appellate Division, First Department, reported at 78 A.D.2d 839, 433 N.Y.S.2d 164 (1st Dep't 1980), are reproduced in Appendix C. The opinion of the New York State Supreme Court, New York County (Special Term), which is not

officially reported and unofficially reported at 5 Media L. Rep. (BNA) 2581 (Sup. Ct. N.Y. County 1980), is reproduced in Appendix D.

## JURISDICTION

The order of the Court of Appeals of New York was entered on April 7, 1982. A timely petition for reargument was denied on July 2, 1982. (The orders of the Court of Appeals of New York denying reargument motions are reproduced in Appendix B.) On September 21, 1982, Justice Marshall extended the time for filing this petition to and including November 15, 1982. (Justice Marshall's order is reproduced in Appendix E.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions involved are the first, third, fourth, fifth, ninth, and fourteenth amendments to the United States Constitution, all of which are reproduced in Appendix F, except for the fourteenth amendment, which is set forth in relevant part only.

Statutory provisions involved are sections 50 and 51 of the New York Civil Rights Law, both of which are reproduced in Appendix G.

## STATEMENT OF THE CASE

This case involves the issue of whether newspapers have the right to use private persons, without their prior knowledge or consent, as props or unpaid models to illustrate matters in which they have no involvement. On Sunday morning, December 3, 1978, petitioner Clarence Arrington, a young black professional, awakened to find that his photograph took up the entire front page of *The New York Times Magazine* ("*Times Magazine*") section, which had been disseminated to millions of persons in New York and throughout the country.

The photograph had been taken, without his knowledge, at random on the New York streets apparently because Arrington was a neatly dressed and attractive young black whose picture could serve as an effective illustration for an article criticizing the black middle class for allegedly turning their backs on the less-fortunate members of their race. Arrington had nothing whatever to do with the article. He was being used purely as a model for illustrative purposes. Indeed, among the first comments he received about the article were those of friends who assumed that he had cheapened himself by selling his photograph to illustrate an article whose views were entirely repugnant to his own. Arrington was outraged by this indifferent treatment of his personality and accordingly sought legal redress.

Arrington's complaint against the publisher, the photographer, the photographer's agent, and the agent's company alleged violations of New York's privacy statute, CIV. RIGHTS LAW §§ 50–51 (McKinney's 1976), the common law, and state and federal constitutional rights to privacy. Upholding dismissal of the complaint against the publisher on respondents' motions to dismiss for failure to state a cause of action, Judge Fuchsberg, writing for the Court of Appeals of New York, held that there could be no cause of action against the publisher under the New York privacy statute, the common law, and the United States Constitution. However, as to the other respondents, the court below held that the allegations of the complaint, if proven, would establish a cause of action. The court below did not expressly address Arrington's claim under the New York Constitution.

*Facts About Arrington and Publication of his Photograph.* Arrington has not sought, nor been the subject of, any coverage by the news media (R 69).[1] Arrington, 31 years old, is an alumnus of the Graduate School of Business at

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1. Record citations, which are made herein by citing "R" followed by the page or pages to which reference is made, are to the Record on Appeal before the Court of Appeals of New York. Petitioner has not requested that the Record on Appeal be certified and transmitted to this Court.

Columbia University; he worked for General Motors when the photograph was published (R 68) and now works for the Ford Foundation. Arrington's picture appeared as the front outside cover of the *Times Magazine* in connection with the article entitled *The Black Middle Class: Making It*, by William Brashler ("Brashler article" (R 35–R 49)).[2]

While all the facts surrounding the unauthorized taking and publication of Arrington's photograph are not known,[3] according to photographer Gorgoni's affidavit, Arrington's picture was among those taken by him, without requesting prior permission, pursuant to an assignment from The Times. In November 1978, The Times requested Gorgoni to photograph "well-dressed blacks on the street" for the cover of an upcoming article on the black middle class (R 63). Gorgoni submitted "over one hundred color transparencies," from which The Times selected two, including that of Arrington. Gorgoni billed The Times $1,600 (R 63–R 64).

Respondents never requested or received Arrington's permission to take, sell, and publish his picture. Indeed, before its appearance in the *Times Magazine*, Arrington was not even aware his picture had been taken (R 69). Arrington first learned of the use of his photograph on Sunday morning, December 3, when he was called and so informed by a person with whom he worked (R 69).

*The Brashler Article.* The central character of the Brashler article is a black prostitute-turned-receptionist; its central thesis is that "[t]he most celebrated Kerner Commission conclusion of 1968—'Our nation is moving

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2. By letter dated November 15, 1982 to the Clerk of this Court, petitioner's counsel filed a copy of the Brashler article, including the photograph.

3. The facts stated herein are based upon the allegations of the complaint, Arrington's affidavit, and the affidavits submitted by respondents Pledge and Gorgoni in support of their motions to dismiss. Apart from an attorney's affidavit attaching a copy of the Brashler article, The Times did not submit an affidavit.

toward two societies, one black, one white - separate and unequal'—has turned out to be only partially fulfilled" (R 38), and that there is now a growing "black middle/professional class" which is becoming less and less concerned about the plight of their less fortunate black brethren.

The characters in the Brashler article, said to be members of the "black middle/professional class," are portrayed as persons whose primary concerns, apart from the desire to remove themselves geographically and psychologically from the "ghetto," are to wear "three-piece Pierre Cardins" and to drive foreign cars such as Mercedes-Benz. According to Mr. Brashler, so important is a Mercedes-Benz to the "black middle/professional class" that one of them portrayed in the article is said to have been bothered for a whole day by not knowing that a neighbor of his also owns such a car (R 38).[4]

Those who saw Arrington's picture, including friends and colleagues, identified it with the Brashler article (R 79-80). Arrington has received highly critical comments for his seeming approval, by appearing as the front outside cover, of the views expressed in the Brashler article (R 70). Moreover, colleagues have asked him whether or not be is "moonlighting" as a model (R 70).

*The Complaint.* Arrington alleged that Gorgoni, without his knowledge or consent, took his picture; that Contact acting through Pledge sold that picture to The Times; and that respondents engaged in concerted action for the purpose of using Arrington's picture to promote the sale of the *Times Magazine* (R 30). The complaint further alleged that Arrington's picture was published, without consent, willfully and knowingly in New York and throughout the United States (R 31-32). Moreover, the complaint alleged that publication of Arrington's picture incorrectly conveyed the impression that he is a model who posed for the picture and identified him

4. The Brashler article has been the focus of sharp and acrimonious controversy in the news media (R 75-R 80). Involuntarily, Arrington has been dragged into that controversy.

with the views expressed in the Brashler article (R 31–32). The complaint requested injunctive relief and compensatory damages of $150,000 and punitive damages of $1,000,000 against respondents, jointly and severally (R 34).

*The Proceedings Below.* On respondents' motions to dismiss, the New York State Supreme Court, New York County (Special Term), held that Arrington did not have a cause of action for alleged violation of the New York privacy statute and granted him leave to file an amended complaint only against The Times not based upon an alleged violation of such statute. In Special Term's memorandum decision, Justice Louis J. Okin held that Arrington had a "right to plead a cause of action limited to a breach of [his] Constitutional right of privacy. . ." (A 48).[5] Justice Okin, however, denied Arrington's statutory claim against The Times, holding that publication of a picture in connection with an article of general interest was, as a matter of law, not "for advertising purposes or for the purposes of trade" within the meaning of the Civil Rights Law (A 44–45). The complaint against the other three respondents was dismissed because Justice Okin held that their activities related only to the taking of Arrington's picture and not to its publication, for which only The Times is responsible (A 48).

In its memorandum decision, the New York State Supreme Court, Appellate Division, First Department, reversed Special Term's grant of leave to file an amended complaint against The Times and affirmed dismissal of the complaint against the other respondents. Without stating any reason, the Appellate Division held that "Special Term ruled correctly that plaintiff has no cause of action under the Civil Rights Law . . ." (A 38). The Appellate Division also ruled that "constraining precedent" compelled it to hold that a common-law right of privacy does not presently exist in New York and that, where a constitutional privacy right exists, it is limited to "governmental action or intrusion into purely

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5. Citations to the Appendix to this petition are made by citing "A" followed by the page or pages to which reference is made.

familial matters [citing four cases from this Court only]" (A 39). In dissent, Justice Presiding Kupferman indicated that he would affirm Special Term's leave to file an amended complaint against The Times, because Arrington had stated a privacy cause of action (A 39–40).

The New York Court of Appeals held that there was a cause of action against the photographer, his agent, and the agent's company for taking and selling Arrington's photograph at the request of The Times, but declined to apply such ruling against The Times for publication of the photograph without Arrington's knowledge or consent. If Arrington were to prove a "nonconsensual selling of the photograph," the court reasoned, he will have established a cause of action against these respondents because they will have been shown to have engaged in "trade" within the meaning of the New York privacy statute (A 34).[6] Acknowledging that the other respondents acted at the behest of The Times (A 29), the court below stated that because they did not play the "part of publisher of the article" they could not share the "publisher's immunity..." (A 34–35).

Narrowly construing the New York privacy statute[7] because of "the values our State and Federal Constitutions bespeak in the area of free speech and free press" (A 31), the New York Court of Appeals held there could be no cause of action against The Times because Arrington's picture was used to illustrate an article of public interest and because it found that the mere fact Arrington was a middle class black was sufficient "real relationship" to the Brashler article to call into play the "publisher's immunity." On motions to dismiss the complaint, the court below found that Arrington has a "real

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6. Oddly, the reasoning of the court below would grant a privacy cause of action to the other persons photographed by Gorgoni whose pictures, although sold to The Times, were not selected for publication.

7. This statute was enacted in direct response to *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902). On the meaning of this case to the court that decided it, see O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 441 (1902).

relationship" to the Brashler article. Without establishing a relationship between Arrington and the particular conception of the black middle class discussed in the Brashler article, the court below found the presence of a "real relationship" in the fact that Arrington could be classified middle class (A 32).

In denying Arrington's claim for a common-law cause of action,[8] the court stated:

> There has been serious concern that, by sidestepping the safeguards which restrain the reach of traditional public defamation litigation, a false light approach could compromise the constitutional guarantee of freedom of the press [citations omitted].

(A 33).

Arrington's claim for a constitutional right of privacy was denied because "no State action is involved..." (A 35).

In sum, the court below held that, while Arrington had a legal remedy against the other respondents for violation of his privacy, he had none against The Times because that is "part of the price every person must be prepared to pay for a society in which information and opinion flow freely" (A 33).

## REASONS FOR GRANTING THE WRIT

There are two reasons for granting a certiorari petition in this case. First, the court below incorrectly held that the first amendment precludes Arrington from having a legal remedy against The Times for violation of his privacy.

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8. The common-law right of privacy is recognized in all but few states. *See* Abrams, *The Press, Privacy and the Constitution*, N.Y. Times, Aug. 21, 1977, § 6 (Magazine), at 13; COMMUNICATIONS LAW - 1978, at 257-71 (J. Goodale, Chrm'n, PLI); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 804 (4th ed. 1976). New York is among those states not recognizing a common-law privacy right.

Second, the decision below, in so holding, violates Arrington's right of privacy under the federal Constitution.

This Court has held that in appropriate circumstances, present here, a person's privacy can be protected against intrusions by the press. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974). In denying a cause of action against The Times, the court below clearly erred. This Court should correct that error.

The importance of correcting that error is highlighted by the recurrence of privacy cases against media defendants in which lower courts are uncertain of the extent to which the first amendment bars a cause of action. *See, e.g., Gilham v. Burlington Northern, Inc.*, No. 73-1649 (9th Cir. May 27, 1975)(available Nov. 10, 1982, on LEXIS, Genfed library); *Uhl v. Columbia Broadcasting Systems, Inc.*, 476 F. Supp. 1134 (W.D. Pa. 1979). Significantly, on facts similar to those presented herein, other courts, contrary to the ruling below, have perceived no first amendment bar and have granted a cause of action. *See, e.g., Clark v. American Broadcasting Cos., Inc.*, 684 F.2d 1208 (6th Cir. 1982); *Leverton v. Curtis Pub. Co.*, 192 F.2d 974 (3rd Cir. 1951); *Raible v. Newsweek, Inc.*, 341 F. Supp. 804 (W.D. Pa. 1972); *Peay v. Curtis Pub. Co.*, 78 F. Supp. 305 (D.D.C. 1948). *See also* Annot., 30 A.L.R. 3d 203, 223 (1970).

The decision below violates the right of privacy recognized under the federal Constitution. While the Court has held that "emanations" from several amendments to the United States Constitution establish a right of privacy, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), and while the Court has noted powerful arguments in support of a right to privacy, it has not had occasion prior to this case to decide on the extent to which the right of privacy bars appropriation by the media of a private person's photograph. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975). Recognition of a constitutional right to privacy, we submit, requires a state to protect a nonpublic person against appropriation of his photograph for use, without his consent, to

illustrate an article with which he has no connection.[9]

## Point I - The First Amendment Does Not Prohibit a State From Declaring Unlawful the Appropriation by Publication of a Nonpublic Person's Photograph.

As shown above at pages 7–8, the New York Court of Appeals was obviously of the erroneous view that a privacy action against The Times would violate the first amendment.[10] Recognizing that Arrington's privacy has been violated, the court below held there was a cause of action against respondents, except The Times. While The Times is clearly overwhelmingly responsible for violating Arrington's privacy, the lower court held that The Times has a "publisher's immunity," but that Arrington has a cause of action against the other respondents, all of whom, the court below recognized, acted at the behest of The Times.

The only plausible reason the court below reached this result was its incorrect view that the first amendment bars a cause of action against The Times. Approximately one month before publication of the Brashler article, The Times requested Gorgoni to photograph well-dressed blacks such as Arrington walking in the streets and then, without consent, published Arrington's photograph with the Brashler article. A principal, such as The Times, is liable for the tort of an agent, such as Gorgoni, committed during the course of performing the

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9. The *Griswold* case was said by Dean Prosser to have overruled the narrow interpretation of the New York privacy statute reaffirmed and applied by the court below in this case. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS at 816.

10. The Times argued that such a ruling is precluded by the first amendment. *See* Brief for Defendant-Respondent The New York Times Company at 48–50, *Arrington v. N.Y. Times Co., et al.*, 55 N.Y.2d 433, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982).

principal's work, even when the principal commits no independent wrong. *See American Society of Mechanical Engineers V. Hydrolevel Corp.*, 50 U.S.L.W. 4512, 4515 (U.S. May 17, 1982). A fortiorari, when, as here, the principal specifically directs the agent to commit a tort, the principal is unmistakably liable, directly or derivatively. Moreover, this is especially true when, as here, the principal and agent engaged in concerted action in committing the tort.

The court below held there was a "trade" transaction within the meaning of the New York privacy statute. In a trade transaction involving a sale, there must be a seller — here, Gorgoni — and purchaser — here, The Times. Since the court below held there was a cause of action against Gorgoni as seller, there must also be one against The Times as purchaser. Unless the statute makes only the seller liable or exempts a sale to a publisher from its coverage, neither of which is the case here,[11] the same statutory word ("trade") cannot have different meanings, depending on the identity of the person against whom it is applied. This would violate a well-recognized rule of statutory interpretation. *See State of Washington v. Comm'r of Internal Revenue*, No. 82-1108, slip op. at 7 (D.C. Cir. Oct. 19, 1982) ("[g]iving two meanings to the same term in the same section violates a cardinal rule of statutory construction"). Therefore, the only reason the court below did not recognize a cause of action against The Times was its mistaken view that The Times had a first amendment immunity.

This Court in *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974), on facts similar to those herein, ruled that there is no first amendment bar to holding the publisher liable. Since the court below decided this case under an erroneous view of the requirements of the first amendment which led it to deny Arrington a cause of action against The Times, this Court should correct that legal error. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-68 (1977).

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11. Indeed, the court below held there was no exemption for the other respondents because Arrington's photograph was sold to a publisher (A35).

Writing for the Court, Justice Stewart in *Cantrell* correctly held that a privacy action against a media defendant does not violate the first amendment. There, plaintiffs brought a privacy action against a newspaper publisher, its photographer, and one of its former reporters. Plaintiffs argued that their privacy had been violated as a result of inaccuracies contained in a "news feature" story about them published in the Sunday magazine section of the paper. The feature story contained "accompanying photographs." 419 U.S. at 247. Plaintiffs claimed that they were damaged because they suffered "outrage, mental distress, shame, and humiliation." *Id.* at 248.

The two plaintiffs whose claims were submitted to the jury recovered a verdict against all defendants. The court of appeals reversed, holding that "in the light of the First and Fourteenth Amendments, the District Judge should have granted the [defendants'] motion for a directed verdict as to all the [plaintiffs'] claims." *Id.* at 246–47.

This Court reversed, remanding to the court of appeals with direction to enter judgment affirming the judgment of the district court as to two of the three defendants. The verdict against the photographer in *Cantrell*, held the Court, could not stand because of insufficient evidence. *Id.* at 253 n. 5. The only legal issue the Court indicated *Cantrell* presented was the correctness of the district court's instruction to the jury that for plaintiffs to prevail they had to meet the "knowing-or-reckless-falsehood" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), adopted for false-light, privacy actions in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). 419 U.S. at 249–50. Since plaintiffs obtained a verdict without having objected to the jury instruction, the Court did not pass on the issue, stating:

> this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional

> standard announced in *Time, Inc. v. Hill* applies to all false-light cases. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323.

*Id.* at 250–51.

In *Cantrell*, the Court held that the publisher, but not the photographer, could be held liable. The photographs taken by the photographer for the publisher in *Cantrell*, the Court reasoned, were accurate depictions of what he saw. The publisher, however, published the photographs in a way that presented plaintiffs in *Cantrell* in a false light. On substantially identical facts, the court below reached an opposite result: a cause of action was recognized against the photographer, but not the publisher. The holding in *Cantrell* clearly mandates a reversal of this flawed result. Moreover, this flawed result is made worse by the fact that, unlike random photographs taken by a free-lance photographer and subsequently sold for publication, the photographer in this case was specifically requested by The Times to do what he did — namely, photograph "well-dressed blacks on the street."

A person walking on a public street does not do so at the risk that he can, without knowledge or consent, be photographed and prominently displayed as the centerpiece of an article with which he has no connection. Without doubt, the right of privacy protects against such conduct, as the New York Court of Appeals has seemingly previously recognized. *See Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359 & 360 (1952) ("the individual may not be singled out and unduly featured merely because he is on the scene[;]" "[o]ne traveling upon the public highway ... may not be picked out of a crowd alone ... and unduly featured for public view").

Arrington's privacy would thus have been violated even had he agreed with the views of the Brashler article. That violation, however, was aggravated in that Arrington was dragged into a controversy that he was not involved in and associated with views in that controversy which he does not share. Only The Times is responsible for this egregious violation of

Arrington's privacy.[12] To hold, as the court below did, that the photographer, but not The Times, could be liable is unjust and contrary to the *Cantrell* ruling.

In denying a cause of action against The Times, the court below was in error when it concluded that publication of a nonpublic person's photograph to illustrate an article of public interest is protected by the first amendment (A 31-33). In focusing on the public interest nature of the Brashler article, the court below failed to give adequate consideration to Arrington's interest in not being associated with the article. This is wrong. Arrington is a private person who has not, voluntarily or involuntarily, become involved in a public controversy about the black middle class. While conceding the Brashler article is of public interest, Arrington's middle class background, in itself, does not permit The Times to drag him into a controversy about the contemporary nature of the black middle class.

In holding that Arrington's middle class background, without more, was sufficient to associate him with the Brashler article, the court below clearly erred. Arrington cannot legitimately be associated with the Brashler article unless there is a "logical nexus" between him and the article. *See Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980)(*per curiam*). To establish a "logical nexus," it must be shown, we submit, that Arrington is the sort of middle class black discussed in the Brashler article. This has not been shown. That Arrington, according to some definition of middle class, could be called middle class is insufficient to associate him with the Brashler article. Moreover, since The Times presumably did not know of Arrington's background before publication, the lower court's reasoning makes the connection between a nonpublic person and an article of public interest turn on the wholly fortuitous circumstance of the publisher having

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12. While the photographer acted at the request of The Times in taking Arrington's photograph, he apparently did not know of the nature of the article with which Arrington's picture would be published. *See* Malyon, *The Fateful Photograph*, CAMERA ARTS, Oct. 1982, at 91-92.

selected the "right" photograph. Paradoxically, if Arrington had been a well-dressed drug trafficker, the lower court's reasoning would have resulted in a cause of action against The Times. This Court's relevant cases call for reversal of this erroneous ruling.

The error made in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1970) of giving insufficient weight to a nonpublic person's interest in not being associated with media discussions of matters of public interest, corrected for defamation cases in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), should also be corrected for privacy cases. *Compare Time, Inc. v. Hill*, 385 U.S. 374 (1967), *with Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974). In *Rosenbloom*, the Court extended the *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) rule to all "matters of public or general interest." However, a rule granting blanket immunity for all nondefamatory uses of photographs when published with articles of public interest is unsound, because it provides little or no protection for the interest of a private person in not being associated with matters with which he has no connection, even if such matters are of public interest.

Recognizing this, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court "repudiated" the *Rosenbloom* decision. 3 *Restatement (Second) of Torts* § 652E, at 398 (1977). Putting aside an all-purpose public figure, which Arrington is not, *Gertz* makes clear that unless a person voluntarily or involuntarily becomes involved in a controversy of public interest, it is improper for the media to associate such person with that controversy.

Since *Time, Inc. v. Hill*, 385 U.S. 374 (1967), which extended the "actual malice" standard to privacy actions, was decided before *Gertz* and thus does not reflect the balance struck in *Gertz*, and since the court below decided this case informed by an erroneous view of the weight to give the competing interests in this case, this Court should correct that error by making clear that the *Gertz* rules also apply to privacy actions. Absent a ruling from this Court, lower courts are not sure on "whether *Hill's* 'matters of public interest' rationale

survives *Gertz's* rejection of the 'public issue' test of *Rosenbloom*, at least when the plaintiff is a private individual." *Fitzgerald v. Penthouse Int'l. Ltd.*, 525 F.Supp. 585, 602 (D. Md. 1981). We submit that the *Gertz* rules do apply to privacy actions and, because of the lower court's contrary ruling, this is an appropriate case to so hold. *See Dresbach v. Doubleday & Co., Inc.*, 518 F.Supp. 1285, 1288 (D.D.C. 1981) ("Although the Supreme Court has had no occasion to decide [whether the *Gertz* ruling applies to privacy cases,] no reason appears to distinguish . . . privacy actions from defamation actions in this regard.") Application of the *Gertz* rules to this case would make it improper for Arrington to be associated with the Brashler article, requiring reversal of the decision below.

Arrington has never taken a public position by publication or use of the media on the nature of the contemporary black middle class. He cannot therefore be said to have voluntarily become involved in this subject matter of public interest. *Compare Fitzgerald v. Penthouse Int'l. Ltd.*, 525 F. Supp. 585 (D. Md. 1981) (person who has written about, and voluntarily appeared on "60 Minutes" to discuss, military applications of dolphin technology may be associated with article discussing that subject). Arrington cannot involuntarily be dragged into Mr. Brashler's discussion of the nature of the black middle class. The only thing that makes Arrington of public interest is The Times's decision that his appearance made him someone whose photograph they wished to publish with the Brashler article. By itself, such a decision cannot overcome Arrington's right to privacy. *See Cantrell v. American Broadcasting Cos., Inc.*, 529 F.Supp. 746, 758 (N.D. Ill. 1981).

**Point II - Petitioner's Constitutional Right of Privacy Has Been Violated.**

*A Right of Privacy is Recognized Under the United States Constitution.* A right to privacy under the federal Constitution is now firmly established. *See, e.g., Whalen v. Roe,* 429 U.S. 589, 598-99 n.23 (1977); *Roe v. Wade,* 410 U.S. 113, *reh'g denied,* 410 U.S. 959 (1973); *Rosenblatt v. Baer,* 383 U.S. 75, 91 (1966) (Stewart, J., concurring); *Griswold v. Connecticut,* 381 U.S. 479 (1965). *See also York v. Story,* 324 F.2d 450 (9th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964); Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(4), 88 Stat. 1897 (1974) (codified at 5 U.S.C. § 552a (1977)) ("the right to privacy is a personal and fundamental right protected by the Constitution of the United States..."). In failing to give Arrington a cause of action against The Times, the decision of the lower court violates the federal constitutional right of privacy.

Although first expressly recognized in *Griswold*, protection of privacy has had a long and distinguished history in the Court's opinions over a wide range of contexts. *See, e.g., FCC v. Pacifica Foundation,* 438 U.S. 726 (1978); *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977); *Roe v. Wade,* 410 U.S. 173, *reh'g denied,* 410 U.S. 959 (1973); *Stanley v. Georgia,* 394 U.S. 557 (1969); *Schneider v. Smith,* 390 U.S. 17 (1968); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Hickman v. Taylor,* 329 U.S. 495 (1947); *Olmstead v. United States,* 277 U.S. 438 (1928) (Brandeis, J., dissenting); *Union Pacific R. Co. v. Botsford,* 141 U.S. 250 (1891); *Boyd v. United States,* 116 U.S. 616 (1886).

The recognition in constitutional law of a right to privacy reflects a legal affirmation of the deeply rooted moral belief in our society that each individual's liberty and autonomy concerning decisions over the use of his or her person is not lightly to be disregarded. *See Pavesich v. New England Life Ins. Co.,* 122 Ga. 190, 50 S.E. 68 (1905); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean*

*Prosser*, 39 N.Y.U.L. REV. 962 (1964); Note, *Publicity as an Aspect of Privacy and Personal Autonomy*, 50 S. CALIF. L. REV. 727, 729–31 (1982). No one, without consent, should have his or her person used by another for that other's purpose, unless there are compelling reasons warranting such use.[13] There are no compelling reasons to support The Times's use of Arrington's photograph. If The Times, in exercising its unquestionable right to publish articles such as Mr. Brashler's, deemed it advisable to include a private individual's photograph for illustration, it could have used alternatives that would not have resulted in a privacy violation. For example, The Times could have used the photograph of a person who would have granted consent,[14] or that of a model. No one has any legitimate interest, much less a constitutionally recognizable one, in seeing the photograph of Arrington published with the Brashler article.

Widely respected persons, members of this Court among them, have made forceful arguments in favor of a constitutional right to privacy. "The right to be let alone," wrote Justice Douglas in *Public Util. Comm'n v. Pollack*, 343 U.S. 451, 467 (1952) (dissenting opinion), "is indeed the beginning of all freedom." Years before, Justice Brandeis had penned words expressing this similar profound idea: "[T]he right to be let alone — [is] the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S 438, 478 (1928) (dissenting opinion).[15]

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13. Moreover, in other contexts this Court has made clear that no one against his or her wish should be associated with views with which he or she disagrees. *See Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

14. Since the photographer was given the assignment in November 1978 and the article was published on December 3, 1978, there was ample time for The Times to have obtained a person who would have consented to use of his photograph.

15. In *Katz v. United States*, 389 U.S. 347 (1967), the dissenting views of Justice Brandeis in *Olmstead* became those of the Court.

In *Cox Broadcasting Corp.*, the Court recognized that

> powerful arguments can be made, and have been made, that however it may be ultimately defined there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.

420 U.S. at 487 (footnote omitted; emphasis in original). Although *Cox Broadcasting Corp.* upheld the right of the press to publish accurate information contained in public records, it expressly differentiated between that type of privacy claim and one based upon appropriation of a photograph, stating: "we should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's photograph . . . ." *Id.* at 489. What was not at issue in *Cox Broadcasting Corp.* is squarely presented in this case.

*The Required Element of State Action is Present in this Case.* The court below erred in holding that there is no state action involved in this case. Denial of relief to Arrington by the state courts itself constitutes state action for purposes of the fourteenth amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 14–18 (1948); *Galella v. Onassis*, 353 F. Supp. 196, 231 (S.D.N.Y. 1972), *aff'd as modified*, 487 F.2d 986 (2d Cir. 1973); *Nader v. General Motors Corp.*, 57 Misc.2d 301, 305, 292 N.Y.S.2d 514, 518 (Sup. Ct. N.Y. County 1968), *aff'd on other grounds*, 31 A.D.2d 392, 298 N.Y.S.2d 137 (1st Dep't 1969), *aff'd*, 25 N.Y.2d 560, 307 N.Y.S.2d 647 (1970). To paraphrase the Court's language in *New York Times Co. v. Sullivan*, although this is a civil lawsuit between private parties, the New York courts have applied a state rule of law which petitioner claims to violate his constitutional right of privacy. 376 U.S. at 265. While the Court's cases have applied this ruling in situations involving a constitutional defense, we submit, as the above-cited lower court cases correctly held, such ruling should be followed in a case, such as here, where plaintiff raises a constitutional claim.

There are additional reasons for finding state action against The Times. First, the Court has held that a private party performing a public function is subject to constitutional standards. *Marsh v. Alabama* 326 U.S. 501 (1946). Members of the media such as The Times clearly perform a public function. *See Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) ("[a] free press is indispensable to the workings of our democratic society"). As observed by one who enjoys a close relationship with the journalism profession: "I experienced the symbiotic relationship in Washington between media and government. Much as the journalist may resent it, he performs a partly governmental function." H. Kissinger, *White House Years* 21 (1979).

Second, the press is the "only organized private business that is given explicit constitutional protection." Address by Justice Stewart, Yale Law School (Nov. 2, 1974), *reprinted, except for opening courtesies, in* Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 633 (1975). *See also Associated Press v. United States*, 326 U.S. at 29 (Frankfurter, J., concurring) (media "enjoy a unique constitutional position"). As such, the press properly enjoys especial constitutional privileges. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). With such especial constitutional privileges, there must be a "legal demand of greater accountability." Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 18–19 & n.60 (1980).

Finally, on the accepted theory that a private party performing a quasi-governmental function is subject to constitutional standards,[16] we submit that the business of news dissemination is sufficiently quasi-governmental that, when combined with the two points made above, a finding of state action against The Times is amply warranted. The press performs the function of a fourth, but independent, branch of government providing a check on official power. *See* Stewart, *Or of the*

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16. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

*Press*, 26 HASTINGS L.J. at 634; Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 591-92 (1979); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM.B. FOUNDATION RESEARCH J. 521. Much as the actions of the three official branches of government are subject to constitutional standards to guard against the abuse of power, so too must the conduct of the press be limited by constitutional norms for the same reason. *See* Miller, *The William O. Douglas Lecture: Press Versus Privacy*, 16 GONZ. L. REV. 843, 850-51 (1981). In performing its public function an institution such as The Times possesses formidable power indeed. *See generally* H. Salisbury, *Without Fear or Favor: An Uncompromising Look at the New York Times* (1980).

Private individuals such as Arrington have no effective remedies, save for legal ones, against infliction of personal injury by a powerful media institution such as The Times. Since protection of the individual against the exercise of arbitrary and capricious power has traditionally been the function of the judiciary, this Court should hold that a powerful media institution enjoying especial constitutional privileges should be held to constitutional norms.[17]

## CONCLUSION

In performing the vital function of providing the means by which the views expressed in the Brashler article were disseminated to the public, there was absolutely no need for The Times to have directed the other respondents to take and then for it to have published the picture of Arrington. Not only was

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17. *See* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUNDATION RESEARCH J. 521, 629 n. 341 ("conventional analysis of the state-action question can support the conclusion that the editorial decisions of mass-media outlets are sufficiently analogous to, intertwined with, or supported by the exercise of power by the state to make them subject to First Amendment standards . . . ").

the use of Arrington's photograph a violation of his privacy, as the court below obviously recognized; it was also the manipulation of an individual in a way that makes him appear to be something he is not, that identifies him with views he does not share, that has brought him unsought and unwanted publicity by dragging him into a public controversy with which he has no connection, and that has adversely affected him in the eyes of his friends and professional colleagues, all of which were done only by The Times. Surely a nonpublic individual's right of privacy prohibits, and the press clause of the first amendment does not protect, the publication of Arrington's picture in the circumstances in which it was done.

For the foregoing reasons, a writ of certiorari should issue to review the opinion and order of the Court of Appeals of New York.

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